LIBRARY
SUPREME COURT, U. S.

Office - Supreme Court, U. S.
FILED
DEC 9 1949
CHARLES ELMORE CROPLEY

IN THE

Supreme Court of the United States

OCTOBER TERM, 1949

No. 274

UNITED STATES OF AMERICA, PETITIONER,

v.

INTERNATIONAL SALT COMPANY, RESPONDENT.

BRIEF FOR RESPONDENT, INTERNATIONAL SALT COMPANY

FREDERIC R. SANBORN,
Counsel for Respondent,
International Salt Company.

APPEAL PRINTING CO., INC., 150 CEDAR STREET, NEW YORK, WO 4-3083

INDEX

	PAGE
QUESTIONS PRESENTED	1
STATEMENT OF ADDITIONAL FACTS	4
SUMMARY OF ARGUMENT	10
ARGUMENT:	
I. The lower courts correctly held that after the Court of Appeals had made its final decree in 1943 in the proceeding under Section 5 of the Federal Trade Commission Act, the Commission had no statutory or lawful power, almost five years later, to require a subsequent report to enforce compliance with that Court's final decree	12
A. Preliminary General Legal History	18
B. Specific Legal History:	
1. Of Section 6(a)—(antitrust)	21
2. Of Section 6(b) and Section 10 (third paragraph)—(antitrust)	23
3. Of Section 6(c)—(antitrust)	25
4. Of the new Section 5—(unfair competition)	27
5. In conclusion—résumé of the two categories	29
C. Textual Analysis of the Sections Involved	29
1. Section 6—The Old Antitrust Investigatory Section	30

PAGE

2. The Commission's Own Interpretation of the Nature of Section 6 34

3. Section 5—The New Unfair Competition Section 43

4. Section 10—Particularly the Forfeiture Provision 49

5. Résumé—Sections 5 and 6 Are Not Related, But Independent 51

II. The Commission's purported order of September 2, 1947, was invalid. It was predicated on Rule XXVI(b), which, as applied to respondent in this case, is *ultra vires* and void. Nevertheless respondent's further report constituted a compliance therewith 53

A. Background of Rule XXVI 54

B. Rule XXVI(b) is Not Authorized by Law 60

C. The Commission Has Failed to Comply With the Requirements of the Administrative Procedure Act of 1946. Consequently Rule XXVI(b) and the Procedure Envisaged Therein Are Invalid and Void 62

D. Rule XXVI(b) Could Be Lawfully Applied To This Respondent Only If the Court of Appeals' Decree of April 20, 1943, Were Appropriately Modified In Some New Court Order 64

E. The *ex parte* Attempt of the Federal Trade Commission to Modify the 1943 Decree of the Court of Appeals Was Unlawful and Invalid 66

PAGE

III. The Commission's rules, etc., did not purport nor lawfully permit it, in the disguise of requiring a purported report, to confiscate an expensive set of books without paying, or offering to pay, just compensation therefor. The respondent otherwise essentially complied with the Commission's order 70

IV. The power of the Commission to require an *original* certificate of compliance under Rule XXVI(b) is *not* now in issue 72

Conclusion 73

Citations

Cases:

Baer Bros. Mercantile Co. *v.* Denver & Rio Grande R.R. Co., 233 U. S. 479, 487 13

Crowell *v.* Benson, 285 U. S. 22 66

Federal Trade Commission *v.* American Tobacco Co., 264 U. S. 298 52

Federal Trade Commission *v.* Balme, 23 Fed. (2d) 615 47

Federal Trade Commission *v.* Bunte Bros., 312 U. S. 349 56

Federal Trade Commission *v.* Claire Furnace Co., 274 U. S. 160 15

Federal Trade Commission *v.* Fairyfoot Products Co., 94 Fed. (2d) 844 48

Federal Trade Commission *v.* Gratz, 253 U. S. 421 15

Federal Trade Commission *v.* Millers' National Federation, 47 Fed. (2d) 428 14

Federal Trade Commission *v.* Morrissey, 47 Fed. (2d) 101 48

Federal Trade Commission *v.* National Biscuit Co., 18 Fed. Supp. 667 50

PAGE

Federal Trade Commission *v.* P. Lorillard & Co., 283 Fed. 999 51
Federal Trade Commission *v.* Standard Education Society, 14 Fed. (2d) 947 and 86 Fed. (2d) 692 48
Humphrey's Executor *v.* U. S., 295 U. S. 602 33
Interstate Commerce Commission *v.* Louisville & Nashville R.R., 227 U. S. 88 65
Meyer *v.* W. R. Grace & Co., 290 Fed. 785, 786 61
Morgan *v.* U. S., 304 U. S. 1, 15, 18 68
Norwegian Nitrogen Co. *v.* U. S., 288 U. S. 294, 315 17
Petition of Herschmann, 163 Fed. (2d) 865, 867 61
Schechter Corp *v.* U. S., 295 U. S. 495, 528 15
Southern Railway Co. *v.* Virginia, 290 U. S. 190 66
U. S. *v.* Abilene & Southern Rwy. Co., 265 U. S. 274 66
U. S. *v.* National Biscuit Co., 25 Fed. Supp. 329 50
Western Meat Co. *v.* Federal Trade Commission, 33 Fed. (2d) 824, 825, 827 59
Wichita R.R. *v.* Public Utility Commission, 260 U. S. 48, 59 65
Witiak *v.* D. & H. R.R. Co., 153 Fed. (2d) 379 61

Constitution and Statutes

Constitution of the United States:

Fourth Amendment 52
Fifth Amendment 68, 70

Act of Feb. 14, 1903, 32 Stat. L. 825 ..... 18, 19, 22, 30
Federal Trade Commission Act—(generally) 10, 12, 17, 20, 60

Section 5 thereof (generally) 9, 10, 12, 13, 16, 17, 23, 27, 28, 29, 30, 32, 36, 43, 51, 52, 60, 64
(a) 43
(b) 43
(c) 1, 44, 46

PAGE

(d) 2, 46
(g) 44
(h) 44
(i) 44
(j) 44
(l) 47, 48, 53, 57, 64

Section 6 thereof (generally) 9, 10, 16, 17, 30, 32, 34, 36, 39, 43, 51, 52, 54
(a) 16, 18, 21, 30, 31, 37, 38, 40, 54, 60, 64
(b) 9, 10, 11, 16, 23, 24, 25, 29, 31, 37, 38, 40, 50, 54, 60, 64
(c) 25, 26, 31, 35
(d) 32, 37, 38, 40
(e) 32
(f) 32
(g) 10, 41, 42, 60
(h) 33

Section 10 thereof 10, 11, 17, 23, 24, 29, 49-52

Section 16 thereof 47

Administrative Procedure Act, U. S. Code, Title 5, §§1001-1010 ..... 6, 55, 57-58, 62-63, 69

Wool Products Labeling Act 40-41

Miscellaneous

8 Geo. Washington L. R. 316, 336 59
G. C. Henderson, *The Federal Trade Commission* 19, 22, 57, 61
H. W. Beer, *Federal Trade Commission Proceedings* 33, 44, 47, 48, 57, 62
Senate Report #597, 63rd Congress, 2nd Session 20, 21, 26
Senate Report #1326, 62nd Congress, 3rd Session 19, 20
Senate Resolution #98 19

PAGE

H. R. Report #1142, 63rd Congress, 2nd Session 22, 25, 26, 28
H. R. Bill #15,613, 63rd Congress, 2nd Session 20, 21, 22, 24
S. Bill #4160, 63rd Congress, 2nd Session 20, 21, 23, 25
Rules of Practice of the Federal Trade Commission:
Rule XXVI 9, 10, 11, 53-58, 60-65, 71, 72
Organization, Procedures and Functions of the Federal Trade Commission:
Section 10(b) 64
Section 12 ..... 5-6, 58-59, 69
Section 17 ..... 7-9, 34, 36
Federal Register, Vol. 12 ..... 54, 58, 69
Annual Reports, Federal Trade Commission:
1932 36
1940 37
34 Opinions U. S. Attorney General, 553 37-40
Commerce Clearing House Reports, Vol. 3 42

IN THE

Supreme Court of the United States

OCTOBER TERM, 1949

No. 274

UNITED STATES OF AMERICA, *Petitioner*,

v.

INTERNATIONAL SALT COMPANY, *Respondent*.

BRIEF FOR RESPONDENT, INTERNATIONAL SALT COMPANY

Questions Presented

The petitioner now attempts to create, and in its brief to invite this Court to decide, large and general questions which were neither disputed nor decided in the courts below.

Really the question involved herein is an extremely narrow and limited one, as the Court of Appeals below explicitly held.

The Court of Appeals had made its prior, or basic, decree on April 20, 1943, and the statute expressly made that basic decree "*final*".[1] Further, the statute emphasizes the intent of the Congress that the jurisdiction of

[1] U. S. Code, Tit. 15, Sec. 45, subdivision (c) :—unless reviewed by this Court on certiorari. No such review was sought at that time.

the Court of Appeals to "enforce" or "modify" orders of the Commission "shall be *exclusive*".[2]

Because the 1943 decree was *final*, and because the Court of Appeals' jurisdiction below was *exclusive*, the basic 1943 decree expressly left open a procedural door through which the Commission might enter that Court at any later time. The basic 1943 decree provided:

> "This Court retains jurisdiction of this cause to enter such further orders from time to time as may become necessary effectively to enforce compliance in every respect with this decree and to prevent evasion thereof * * *."[3]

Why, then, in 1948, almost five years later, did the Commission choose to disregard and to ignore this open door, and to flout the plain requirements of orderly procedure? Why did the Commission choose this novel procedure of attempting to collect a harsh forfeiture upon a strained interpretation of the statute? Why did not the Commission choose to go to the Court of Appeals and seek readily and quickly from that Court its further order under the provisions of the 1943 order just quoted above? No brief of the Commission has ever vouchsafed answers to these pertinent questions.

Under such circumstances, and on these particular facts, all that the two Courts below have each held is, in effect, that the novel procedure chosen by the Commission in the present instance was not orderly procedure.[4]

---

[2] U. S. Code, Tit. 15, Sec. 45, subdivision (d).

[3] Int. Salt, R. 25.

[4] While it is claimed that this novel alleged procedure of the Commission has lurked in its Rules since 1936 (Petitioner's Brief, p. 49), it lay dormant there for many years. This case is the first attempt to claim any power to operate under that novel alleged procedure—twelve years after the Rule was made; thirty-four years after the

For this reason the Court of Appeals pointed out that the broad argument of the Commission below (as here) as to its general powers "is beside the point" on the particular facts of this particular case.[5] And that Court continued, disclaiming making any broader decision, and said:

> "* * * We are not here concerned with the power of the Commission, inherent or otherwise, to enforce its own orders, but with its power to enforce or aid in enforcement of a decree of this Court or an order of this Court. This we think it had on its own initiative no power or authority to do."

The present writ of certiorari, in consequence, really involves only the very narrow procedural question that was decided below, viz.:

> 1. Whether, after the Court of Appeals has rendered its *final* decree, retaining *exclusive* jurisdiction of the cause in order "to enforce compliance in every respect * and to prevent evasion thereof" the Commission may proceed further *in that cause*, in enforcement proceedings directly against *that* respondent, quite independently of the Court of Appeals.

Commission was established. Thus there is *no* "long continued administrative construction" (Petitioner's Brief, pp. 11, 38, 48) to support this innovation, which, we think, is intended to by-pass the provisions of the statute making the Court of Appeals' decree "final" and its jurisdiction "exclusive".

And for several decades the Commission has operated successfully without invoking this novel procedure. It therefore seems strange for the Commission to claim (Petitioner's Brief, p. 13) that the decision below placed "a *general* limitation upon the Commission's powers," and that that decision placed "*novel* and impractical *restrictions*" upon the Commission (Petitioner's Brief, p. 32)!

[5] Int. Salt, R. 75.

No other, no larger, no more general, question needs to be decided herein, because no other, no larger, no more general, question was actually decided by the courts below.

Statement of Additional Facts

1. At no place in the record does the Commission claim, even by inference, that this respondent has at any time or in any way disobeyed the 1943 decree.

2. This respondent did in fact file with the Commission a further report of compliance, as the District Court below specifically found,[6] so that the learned judge who dissented below in the Court of Appeals was in factual error when he stated that "The defendants refused to comply * * *," etc.

3. The repeated claims below of the Commission that what it required this respondent to do was to file a "special report" have been abandoned. The Commission has now changed its position, and it now claims—despite the very strict rules of law against forfeitures—that its requirement in its order of an "additional"[8] report, or of an "additional and supplemental"[9] report, or of a "supplemental"[10] report was tantamount to requiring a "special" report, so as to entitle it to recover a strict

---

[6] Int. Salt, R. 54-55; see also, 25-26.

[7] Int. Salt, R. 78. The Commission might wish to dispute the content of the supplemental report, but it cannot justly and fairly claim that no supplemental compliance report was filed with it. Also see, *infra*, pp. 66, 70-72.

[8] Int. Salt, R. pp. 4-5 (twice).

[9] Int. Salt, R. 4 (once).

[10] Int. Salt, R. 5 (twice). In its present brief the Commission appears to concentrate exclusively upon "supplemental" (pp. 10, 49, 50).

forfeiture which the statute provides only for utter failure to file a "special" report.[11] *The word "special" does not appear a single time in the entire order of the Commission.*

4. On or about September 10, 1947 the Commission published in the Federal Register an amended statement of its "Organization, Procedures and Functions", as required by the Administrative Procedure Act of 1946.

5. Section 12 of such statement was printed by the Commission in a pamphlet dated November 20, 1947. (*The prior pamphlet* of the Commission, which is dated December 11, 1946, *contains* in its topic, "Organization, Procedures and Functions", *nothing whatever corresponding to the Section 12 of November, 1947.*) As printed for the first time in the November 20, 1947, pamphlet the new Section 12 reads:

"COMPLIANCE AND ENFORCEMENT

"Sec. 12. (a) Reports of compliance with orders to cease and desist are required in accordance with the provisions of Rule XXVI of the Rules of Practice. The Commission may by order require such supplemental reports of compliance as it considers warranted. Reports of compliance must consist of a full statement showing the manner and form in which the order has been complied with. Mere statements that the respondent is not violating the order are not acceptable. A factual showing is required sufficient to enable the Commission to appraise the manner and form of compliance.

"(b) After an order to cease and desist issued by the Commission pursuant to the Federal Trade

[11] See the sage observations of the Court of Appeals below, Int. Salt, R. 73, middle of the page.

Commission Act has become final as provided for under Section 5 of the Act, and the Commission has reason to believe that a respondent has violated such order, it shall certify the facts concerning the violation to the Attorney General, who may institute a suit in one of the District Courts of the United States for the recovery of civil penalties as provided in the Act. In proceedings under the Federal Trade Commission Act, where a Circuit Court of Appeals of the United States has by decree commanded obedience to the Commission's order, enforcement may be accompanied by way of contempt proceedings in the Circuit Court. With respect to orders under the various provisions of the Clayton Act, enforcement must be accomplished by way of contempt proceedings.

"(c) Matters relating to reports of compliance with, and violation of, or enforcement of Commission orders are handled in the Division of Compliance, which is a part of the General Counsel, under the supervision of an Assistant General Counsel, except that the Division of Appellate Proceedings of the General Counsel handles appearances in the Circuit Courts in enforcement proceedings by way of contempt.

"(d) Matters relating to reports of compliance with voluntary agreements to cease and desist (stipulations) are handled in the Bureau of Stipulations."

Significantly and curiously, the Commission's "Statement of Policy" (pp. 35-42) *filed and published under the Administrative Procedure Act makes no reference to the foregoing provisions.*

(Thus, because of the requirements of the Administrative Procedure Act, the Commission's order of September 2, 1947, was without any lawful foundation.)

6. But the Commission's November 20, 1947, statement of its "Organization, Procedures and Functions" also contained a Section 17. Except for minor changes of official nomenclature, not material herein, Section 17 of 1947 is in all other respects identical with Section 15 of December 11, 1946. As printed in the 1947 pamphlet Section 17 reads (emphasis supplied):

"GENERAL ECONOMIC SURVEYS[12] AND REPORTS

"Sec. 17. (a) Under section 6 of its organic act, the Federal Trade Commission has broad powers to ascertain the facts with respect to the organization, business, conduct, practices, and management of any corporation subject to its jurisdiction, and the relations of any such corporation to other corporations and to individuals, associations, and partnerships. The Commission has power under this section to require such corporations to file with it, *annual* or *special* and both *annual* and *special reports* or answers in writing to specific questions, furnishing to the Commission such information as it may require respecting the business, conduct, practices, management, etc., of any such corporation and its relation to other business enterprises. *These functions of the Commission are performed by its Bureau of Industrial Economics.*

"(b) The administration of this Bureau is conducted by a Director who is also the Chief Economist, and by a Chief Accountant, a Chief Statisti-

[12] Thus the phraseology, "general economic surveys", at which the petitioner somewhat bridles in its brief (pp. 2, and twice at 11) was the phraseology which the Commission itself selected to characterize the extent of its powers to require "annual" or "special" reports from corporations.

And such was the "long-standing administrative construction" which the Commission had given to the scope of its powers *ante litam motam*.

cian and an Assistant Chief Economist who are Assistant Directors of the Bureau.[1] The Commission on its own initiative or upon the application of the Attorney General, may direct this Bureau, whenever a final decree has been entered against any defendant corporation under the Antitrust Acts, to ascertain and report the economic effects of such decree and the manner in which it is being carried out.

"(c) The purposes of these general economic surveys are to ascertain and report the facts to the President or to the Congress concerning general economic conditions, the state of competition and the degree of concentration in a given industry, together with suggestions for remedial legislation. Such general economic surveys are made in response to the request of the President, at the direction of the Congress, or upon the initiative of the Commission.

"(d) In the past, the economic and business facts developed by the Commission have contributed to the adoption of much remedial legislation, including the Stock Yards Act, the Securities Act, the Exchange Act, the Holding Company Act, the Revised Federal Power Commission Act, the Natural Gas Act, etc. In other cases, certain industries have voluntarily made changes in the conduct of their business following disclosures of uneconomic and harmful competitive trade practices.

"(e) This Bureau also furnishes general economic information, including industry-wide costs of

---

[Footnote to the quotation.]

"1. Under the organizational nomenclature adopted by the Commission on November 3, 1947 (See footnote on page 43), the three Assistant Directors are Chiefs in the order named, of the Bureau's three divisions; namely, the Divisions of Accounting, Statistics and Financial Reports and Economics."

> production and of distribution and makes special reports to the Commission for submission to the President, the Congress, and to various government departments and agencies. The personnel of the Bureau includes accountants, economists and statisticians, and as a regular part of its work, members of its staff may be called upon to act as expert witnesses, to advise and consult with the Commission's attorneys, and to prepare accounting, economic, and statistical analyses in connection with legal cases. This is particularly true with respect to basing point and Robinson-Patman cases. The latter cases involve accounting and statistical problems particularly where differences in costs are used as a justification for price differences."

(Thus, *ante litam motam*, the Commission did not claim that Section 6 could be invoked in aid of the enforcement provisions of Section 5.)

7. The claim of the petitioner that the Commission's Rule XXVI(b) provides "for • • • *supplemental* reports of compliance"[13] is not textually supported by the said Rule, which refers *only* to "*further* reports"[14] [of compliance]. Nor is it now expressly asserted by the petitioner that its claim to recover a statutory forfeiture can be predicated upon or supported by that Rule. As the District Court below said:[15]

> "• • • The Commission also insists that Rule XXVI has nothing to do with Section 5 compliance reports, but is only in aid of economic survey reports under Section 6(b)."

---

[13] Petitioner's Brief, p. 50.
[14] Petitioner's Brief, p. 65.
[15] Int. Salt, R. p. 59.

And the Court of Appeals below quoted from the Commission's brief below on this point as follows:[16]

> "• • • We note, however, the following statement from its quotation: 'This rule [XXVI] was promulgated under subsection (g) of Sec. 6 and implements the authority granted the Commission by subsection (b) thereof'. • • •"

SUMMARY OF ARGUMENT

I

The Federal Trade Commission Act is not one single, harmonious whole, but an emulsion of two quite different elements. Its primary and textually longer element is antitrust. Its second element, unfair competition, is to be found only in Section 5. This dichotomy has been recognized in many court decisions, and is also sustained both by the legal history of the enactment of the statute and also by an analysis of the internal provisions of the Act.

In consequence Section 5 is independent of the rest of the Act. Section 5 contains its own complete enforcement scheme. Section 6 deals with entirely different matters, and the forfeiture provision of the third paragraph of Section 10 refers only to Section 6(b), which is not applicable to the present case.

Therefore, after the Court of Appeals had rendered its final decree in 1943, retaining exclusive jurisdiction of this cause in order "to enforce compliance in every respect • • • and to prevent evasion thereof" the Commission could not, years later, proceed further in this cause, in enforcement proceedings directed directly against this respondent, quite independently of the Court of Appeals.

---

[16] Int. Salt, R. p. 75.

II

The Commission's purported 1947 order was invalid. It required what it variously styled as an "additional"; an "additional and supplemental", and a "supplemental", compliance report from this respondent. The order relied for its support on the Commission's Rule XXVI(b) which refers only to "further" compliance reports. Neither the purported order nor the Rule purport to correspond to the "special reports" of Sections 6(b) and 10, and thus the strict rules against forfeitures should be applicable here.

The Commission's purported 1947 order, together with its later orders, was made *ex parte*, without notice or hearing to this respondent, in violation of the Fifth Amendment.

Rule XXVI(b) cannot be supported by any express authority in the Federal Trade Commission Act, and the Commission has failed to comply with the requirements of the Administrative Procedure Act of 1946.

Indeed, although Rule XXVI(b) has existed since 1936, the Commission has never until now sought to give it the novel interpretation contended for by the Commission in the present case.

Notwithstanding, the respondent filed with the Commission its "further report in writing" before the commencement of the present case. The Commission may or may not be satisfied with the contents of that "further report", but it is neither accurate nor fair to claim that no report was filed. As Section 10 provides no forfeiture for filing a report claimed to be insufficient the strict rules against forfeitures should be applicable here.

III

The Commission's rules, etc., did not purport nor lawfully permit it, in the disguise of requiring a purported report, to confiscate an expensive set of books, worth hundreds of dollars, without paying, or offering to pay, just compensation therefor.

Otherwise the respondent essentially complied with the Commission's order.

IV

The power of the Commission to require an *original* compliance report under Rule XXVI(a) is *not* in issue here.

ARGUMENT

I

The lower courts correctly held that after the Court of Appeals had made its final decree in 1943 in the proceeding under Section 5 of the Federal Trade Commission Act, the Commission had no statutory or lawful power, almost five years later, to require a subsequent report to enforce compliance with that Court's final decree.

The Federal Trade Commission Act (hereinafter usually referred to for convenience as the Act), as has often been noted, is *not* one single harmonious whole. As ultimately enacted it is an emulsion of two quite different elements.

Such dichotomies are not uncommon in statutes. Thus this Court long ago noted that, in the cognate field of interstate commerce, the Hepburn Act of 1906 contained

"two matters * * * treated as different subjects and * * * dealt with in separate sections" with "no * * * necessary connection between them * * *." *Baer Brother Mercantile Co.* v. *Denver & Rio Grande R.R. Co.*, 233 U. S. 479, 487.

Such is the recognized and acknowledged duality of the Federal Trade Commission Act. Its larger and longer and original textual element is *antitrust*—that is, all of the Act (*except Section 5*) is *antitrust*."

Section 5 represents the other and newer element—the *unfair competition* element—which is *not antitrust*, because the littlest business enterprise may compete, and sometimes does compete unfairly.

One of the authors of the Appellant's brief below, the Commission's Associate General Counsel, the late Mr. Wooden, dwelt upon this fact of legal history in a speech which he delivered before the National Industrial Conference Board in New York City on November 23, 1948:—"The Future Relations Between the Federal Trade Commission and American Business." Mr. Wooden referred to the creation of the Bureau of Corporations in 1903 to aid in enforcing the Sherman Antitrust Act. He then said:

> "* * * That Bureau was the forerunner and became the nucleus of the Federal Trade Commission. * * *"

Mr. Wooden then referred to

> "* * * the *two* main lines specified by Congress in the original statute. *One* of those duties is

---

[17] Thus it seems exaggerated for the Commission to claim (Petitioner's Brief, twice on p. 14), that its "primary" duty is under Section 5 "to police methods of competition in commerce." Indeed the Petitioner's Brief (p. 41) quotes Senator Cummins as saying that the new Commission is intended to strengthen the *antitrust laws "in the first instance."*

> similar to the work of the Bureau of Corporations, in that it is authorized to make *general investigations* of monopolistic trends and conditions and unfair practices. It reports the results of such studies to Congress for its guidance in legislation and to the public for its understanding of the facts. Such reports have provided the seed bed of such important legislation as the Securities and Exchange Commission Act, the Public Utilities Holding Company Act, the amended Federal Power Commission Act and the Natural Gas Act. Thus the Commission's exposure of dishonest, fraudulent and monopolistic conditions and practices has extended into *areas beyond those in which it has been given any corrective or remedial powers.* There is every reason why the Commission should be called upon in the future to exercise similar fact-finding functions." (Emphasis supplied.)

We think that this is a clear public admission by the Associate General Counsel for the Commission that that body lacks "corrective or remedial powers" in its general investigatory field.

The truth of this fact of legal history has been somewhat extensively noticed by the courts, and particularly so by this Court.

In *Federal Trade Commission* v. *Millers' National Federation*, 47 F. (2d) 428, the Court of Appeals said at page 429 (emphasis supplied):

> "The power of *investigation* conferred upon the Commission by Section 6 is different in character from the *jurisdiction* conferred by Section 5. Section 6 contemplates an investigation for the collection of facts for the information of Congress in aid of the exercise of its legislative function, or for the President in aid of recommending necessary legislation. * * *"

This Court has thrice spoken upon the topic. In *Federal Trade Commission* v. *Gratz*, 253 U. S. 421, this Court said at page 434:

> "Many of the duties imposed upon the [Federal] Trade Commission had been theretofore performed by the Bureau of Corporations. *That which was in essence new legislation was the power conferred by §5.* * * *" (Emphasis supplied.)

And in *Schechter Corp.* v. *U. S.*, 295 U. S. 495, Chief Justice Hughes, writing for a unanimous court, noted at page 532 that Section 5's unfair competition provision "was an expression *new* in the law." On the next page (533), he noted that the Congress had, in consequence of that fact, "set up a special procedure," and that it had also provided, among others, "for *judicial* review to give assurance that the action of the Commission is taken within its *statutory* authority." (Emphasis supplied.)

In *Federal Trade Commission* v. *Claire Furnace Co.*, 274 U. S. 160, where the question involved was the submission of reports under Section 6, we think it plain that this court had the same facts of legal history in mind when it made the following distinction at page 170 (emphasis supplied):

> "Appellees were not charged with practicing unfair methods of competition (Section 5, Act of Sept. 26, 1914) or violating the Clayton Act (c. 323, Sections 2, 3, 7, 8, 38 Stat. 730, 731, 732). *Orders under such charges can be enforced only through a Circuit Court of Appeals* (Section 11, Clayton Act; Section 5, Federal Trade Commission Act).
>
> "*The action of the Commission* here challenged *must be justified*, if at all, *under* the paragraphs of *sections 6* and 9, Act of September 26, 1914, copied below, *and the only methods, prescribed for*

enforcing orders permitted by any of these paragraphs are specified in Sections 9 and *10*. They are applications to the Attorney General to institute an action for mandamus, and proceedings by him to recover the prescribed penalties."

So we submit that the District Court below was quite correct in following such precedents when it wrote:[18]

"When Congress enacted the Federal Trade Commission Act the duties and powers of the new Commission seem to have been divided into two categories. The first category continued the power of investigation and publicity with respect to corporations formerly lodged in its predecessor, the Bureau of Corporations, and now contained in Sections 6(a) and 6(b) of the present Act. However, Congress added a new section, Section 10, providing for a forfeiture of $100.00 a day for failure to file the reports provided for in Sections 6(a) and 6(b). The second category into which the duties of the Federal Trade Commission were divided was provided by Section 5 which prohibits unfair methods of competition and provides the method for its enforcement and penalties. • • •"

And we submit that the Court of Appeals below was likewise wholly correct when it said:[19]

"• • • It can be safely said, however, that such history discloses that Secs. [5] and [6] were not intended as complementary but were designed as separate and distinct, each directed to different situations. The dual purposes embodied in the two sections were recognized in F. T. C. *v.* Miller's National Federation, 47 F. 2d 428, 429, wherein the court stated: 'The power of investigation conferred

[18] Int. Salt, R. 56.
[19] Int. Salt, R. 73.

> upon the Commission by section 6 is different in character from the jurisdiction conferred by section 5. Section 6 contemplates an investigation for the collection of facts for the information of Congress in aid of the exercise of its legislative function, or for the President in aid of recommending necessary legislation.' See also F. T. C. et al. v. Claire Furnace Co., 274 U. S. 160, 170. * * *"

In the light of the foregoing judicial recognition of the legal history of the Act it would seem to be superfluous to set forth the Act's legal history, and to demonstrate the truth of that legal history by a textual analysis of the Act, were it not for the petitioner's insistence to the contrary.

When such problems of legal history and of statutory interpretation are presented, this Court has heretofore approved of what we shall attempt to do hereafter in this brief, of studying

> "* * * the external aids that are drawn from history * * * [and] another that may be said to be internal, the aid to be derived from the wording of related sections. * * *" *Norwegian Nitrogen Co.* v. *U. S.*, 288 U. S. 294, 315.

This study involves to a considerable extent the legislative history, analysis and interpretation of the provisions of Sections 5, 6 and 10 of the Act.[20] Although it will later be necessary to analyze and to interpret these sections we believe it will be helpful, first, to throw light on them through the aid given by examining the legislative history of their original enactment.

---

[20] U. S. Code, Title 15, Sections 45, 46 and 50. For convenience's sake we shall refer to them as sections 5, 6 and 10, as does the petitioner's brief and the District Court below. The Court of Appeals used the code's numerals.

We quite agree with the petitioner that what is said in public debates is of dubious value (Appellant's brief below, pp. 34-35). We think that one or possibly two unconsidered expressions spoken in the course of such debates (Petitioner's brief, pp. 45-47), which petitioner has torn from the context of hundreds of pages of the Congressional Record have a value—if any—which is even more dubious.

But legal history has value; considered, well-reasoned, printed committee reports have value; and surely additions to, or omissions from, the text of the proposed Act may be extremely significant. We hope that this Court, like the Courts below, may find our research into such legislative history to be useful and of help to it in the performance of its task.

A. Preliminary General Legal History.

The Act of February 14, 1903, established the Department of Commerce and Labor; 32 Stat. L., Vol. 1, Chap. 552, p. 825.

Section 6 thereof (*ib.*, p. 828) provided for the creation within the Department of Commerce and Labor of a Bureau of Corporations, to be headed by a Commissioner of Corporations. His powers were

> "to make * * * investigation into the organization, conduct, and management of the business of any corporation * * * engaged in commerce * * * excepting common carriers subject to 'An Act to regulate commerce' * * *.
>
> "* * * to gather, compile * * * information concerning corporations * * *."

(This is essentially the present phraseology of Section 6(a) of the Federal Trade Commission Act.)

The Commissioner of Corporations was given the same subpoena power, and the same power to investigate, as were conferred upon the Interstate Commerce Commission. However the original statute of February 14, 1903, contained no provisions for forfeitures, fines, penalties or other punishments.

For present purposes it is not necessary to trace the vicissitudes or the history of the Bureau of Corporations under the first President Roosevelt, nor to outline the political positions of the Republican Party, the Democratic Party and the Progressive Party concerning "trusts" and corporate combinations, during the 1912 Campaign. These matters appear at length in an excellent book by Mr. Gerard C. Henderson, "*The Federal Trade Commission*", at pages 16-17, and 19-20.

However, after the election of President Wilson, there was passed a Senate Resolution, #98, appointing a Committee to look into the question of the combinations of large corporations, then popularly described as "the Trusts". Under date of February 26, 1913, and pursuant to this Senate Resolution #98, a report was made to the Senate by the Committee on Interstate Commerce; Senate Report #1326, 62nd Congress, Third Session. In this report the *first* recommendation, to be found at page 12, is that the existing Bureau of Corporations be converted into an independent commission, so as to gather

> "more complete and accurate knowledge of the organization, management, and practices of the corporations and associations engaged in national and international commerce than we now have."

The two further recommendations of the Committee were that this proposed Commission (then tentatively

named the Interstate Trade Commission) should, *second*, act with greater promptness in passing upon the legality of corporate combinations in restraint of trade, and, *third*, assist the courts in dissolving any corporate "trust" combinations found to be unlawful under the *antitrust* statutes.

Various hearings were held thereafter and various bills were introduced in the Senate and in the House of Representatives.

Only three among these bills need be mentioned here, viz.:

i. House of Representatives, Bill #15,613, passed by the House (the *first* bill);

ii. Senate Bill #4160, later passed by the Senate (the *second* bill); and

iii. The final compromise bill, which was enacted into law as the Federal Trade Commission Act of September 26, 1914.

Senate Report #597, 63rd Congress, Second Session, to accompany H.R. #15,613, is a report in which the Senate Committee on Interstate Commerce reported the Senate's bill, #4160 (the text of which was printed in full) as a substitute for H.R. #15,613.

As appears from this report, at pages 22 and 23, the guiding idea was the same as the *first* recommendation of the Interstate Commerce Committee report of February 26, 1913, *supra*, namely, that the new Commission should be created primarily for investigation, publicity, and making recommendations to the President and to the Congress.

Hence, as recommended by the Interstate Commerce Committee report, the old Bureau of Corporations was to be taken over lock, stock and barrel.

Such also were the ideas of Mr. Herbert Knox Smith, then the Commissioner of Corporations (the head of the Bureau of Corporations) as set forth in a letter published in this Senate Report #597: see page 28 thereof especially.

In the Senate Report #597, under the topic caption which appears on page 11, viz.: "Powers of Investigation and Reports", the report states, almost at the top of page 12 (emphasis supplied):

> "It will be seen that while large powers of investigation are given, they are not greatly in excess of those possessed and for years exercised by the Bureau of Corporations. *Reports* are required *only* from such corporations or classes or corporations as may be designated by the Commission. There are over 350,000 corporations in this country, of which perhaps a large proportion may be engaged in interstate trade, but it must be realized that *the number affected by the proposed legislation will not exceed 1,000.*"

Thus, even when the *second*, or Senate, bill was being introduced and reported on, the primary emphasis was on the *antitrust* investigatory powers, which were to be extremely limited.

B. Specific Legal History.

1. Of Section 6(a)—(antitrust).

In the Senate Bill #4160, Section 3 corresponds to the present Section 6 of the Act.

As will appear from another report, to be mentioned hereinbelow, Senate Bill #4160, by Section 3, subdivision (a) (the *same* as Section 6(a) of the present Act) was not attempting to create a novel investigatory power more

sweeping than that which was then possessed by the old Bureau of Corporations.

The first bill, drafted by the House of Representatives, (H.R. #15,613) throws a clear light upon the intention of both houses of the Congress in this respect. The H.R. bill's Section 3 was followed by the Senate when it prepared the second bill. Thus Section 3 of each bill corresponds to the present Section 6, and in its Section 3 the House Bill had simply incorporated the investigatory powers of the old Bureau of Corporations by reference to the original statute of February 14, 1903 (H.R. Report #1142, 63rd Congress, 2nd Session, page 11).

The conferees of the Senate and of the House of Representatives which agreed on the third, or compromise, or final, bill thought it to be a matter of better draftsmanship not to incorporate the old powers by a mere reference to the 1903 Statute, but, rather (in their own words),

> "Instead of transferring them [the old powers] by reference to the original act"

to have them "explicitly set out in Section 6, paragraph (a)" of the redrafted bill. (H.R. Report #1142, 63rd Congress, 2nd Session, page 18). Accordingly, this was done in the third or final bill.

Mr. Henderson therefore correctly concludes (*The Federal Trade Commission*, p. 45), in the light of the foregoing clear declaration of the intention of the Congress, that

> .... In general, these [powers] were analogous to the powers of the old Bureau of Corporations; they were an aid to legislation and to the formation of public opinion, *but had no direct relation to the enforcement of the law.*" (Emphasis supplied.)

The use of only the word "corporations" in the draft of what became Section 6, when viewed in the light of Section 5, indicates that the confines of the Bureau of Corporations were being respected in the minds of the draftsmen of the new act. From this it would seem clear that the superimposition of a power to obtain "annual or special reports" upon the existing statutory framework, lifted and copied from the Bureau of Corporations, merely represented an enlargement of the *means* of carrying on general economic and *antitrust* investigations of corporations rather than the creation of a new species of general enforcement power.

Especially is this conclusion strengthened when the court bears in mind that *Section 5 was not created until after the first bill in the House and the second one in the Senate had been drafted.*[21]

2. Of Section 6(b) and Section 10 (third paragraph)—(antitrust).

In the *second*, or Senate Bill, #4160, Section 3(b) (the *same* material as Section 6(b) of the present Act) the ultimate phraseology of the present statute, "by general or special orders" and "annual or special, or both annual and special, reports of answers in writing to specific questions" did not originally appear.

However, part of its essence appeared in embryo form in the next subparagraph (Section 3(c)) which provided for "a uniform system of annual reports from such corporations or classes of corporation • • • as the commission may designate", and authority was also conferred therein on the Commission to require a special report.

In the *third*, or final bill, most of the essence of subdivision (c) was combined into subdivision (b).

---

[21] Int. Salt, R. 75.——

The House's *first* bill had covered this same subject matter in its Section 9, which contained two paragraphs, both unnumbered. The first unnumbered paragraph required all corporations engaged in commerce, having a capital of over five million dollars, or, having a less capital, belonging to a class of corporations designated by the Commission, to make annual reports. These annual reports were to be routine and compulsory, not discretionary. In addition, the Commission was given discretionary authority to "require such special reports as it may deem advisable." The second unnumbered paragraph of Section 9 of the *first* bill provided the new $100 a day forfeiture for failure to file annual or special reports (now constituting the third and unnumbered paragraph of Section 10 of the present Act) in phraseology the essence of which was later copied in the Senate's second Bill, #4160.

This juxtaposition in the *first*, or House Bill, #15,613, of the report power with the $100 a day forfeiture provision in one single section, Section 9, is of great significance, because it offers very persuasive evidence that this forfeiture provision was intended by the Congress to be applicable *only* to these particular report powers of the new Commission when exercised under Section 6(b).

Nor does the form of the Senate, or *second*, bill cast any doubt upon the foregoing fact. The Senate also had provided for the $100 *per diem* forfeiture, but in a separate section, Section 6 of the Senate's bill. However, that Section of the Senate's bill specifically referred back to the earlier report paragraph in the Senate's bill (now Section 6(b) of the Act) and, in phraseology essentially identical with the third paragraph of the present Act's Section 10, made the forfeiture provision specifically ap-

plicable solely to failure to file the annual or special reports provided for in the earlier investigatory Section of the Senate, or second, bill.

After the third, or compromise, bill had been prepared, the conferees of the Senate and the House of Representatives explained in their report (H.R. Report #1142, 63rd Congress, 2nd Session, page 18), with reference to the routine and compulsory requirement of the annual reports contained in the House's original, or first, Bill, that they thought it better not to compel the routine making of such annual reports, by certain defined corporations, but rather to leave the matter of requiring *any* such reports "to the discretion of the commission." In logical consequence they also removed from the third bill the provision of the House Bill which had required such routine reports only to be made by corporations, engaged in commerce and which had a capital of over five million dollars, or, having a less capital but belonging to a class of corporation which the Commission might designate.

3. Of Section 6(c)—(antitrust).

That the Commission was *not* to be given any novel or general law enforcement powers under this investigatory Section 6(b) is further demonstrated by the history of yet another section of the second Bill. The present Section 6(c) is concerned with *investigation* of corporate compliance with *antitrust* decrees. But in the Senate's second Bill #4160, where the corresponding material is to be found in Section 3(f), and where both the present Act and the Senate's second Bill run, essentially identically, "• • • of the manner in which the [order or] decree has been or is being carried out" the Senate's bill as

originally presented contained the following additional matter immediately following, viz.:

> "and as to whether the same has been or is being violated, and what, if any, further order, decree, or relief is advisable."

This last quoted material concerning enforcement powers was stricken out of the second bill prior to the final enactment of the law. It indicates very clearly the strict purpose of the Congress to make the entire Section 6 investigatory only.

Furthermore, in Senate Report #597, 63rd Congress, 2nd Session, under the separate topic caption "POWER TO AID THE COURTS" it is nowhere remotely suggested that the Commission was given any enforcement powers under the investigation section, Section 6. Instead, it is twice stated merely that the Commission should "report its findings * * * to the Attorney General."

The reason for this is historical and is clearly explained in the Committee Reports. The historical reason is that these investigations were directed against the great corporate combinations, or "trusts", and the familiar remedy customarily employed by the courts in those days (just as it has been recently employed against holding companies) was to decree the dissolution of these corporate combinations—or, as Senator Newlands artlessly phrased it (petitioner's brief, p. 46)—"a decree of disorganization."

Accordingly, it is stated (H.R. Report, #1142, 63rd Congress, 2nd Session, page 18), that the present Section 6(c) was intended to meet situations where a court had decreed the dissolution of a "trust" resulting from the combination of earlier corporations. It was believed that

the Commission might be of some help in ascertaining how such an *antitrust* dissolution was working out.

What has been said so far has had to do with the *antitrust* investigatory powers of the new Commission. Indeed, the original statute deals almost exclusively with *antitrust* investigatory matters. Essentially there is only one section of the Act which is not directly or indirectly investigatory and *antitrust* in its nature, and that is Section 5.

4. Of the new Section 5—(unfair competition).

There was also some discussion in 1914 about making a change in the substantive antitrust laws. The pros and cons of that debate are not material here, except to observe that in the end no substantive change was made in the antitrust laws.

Instead, a new and different idea of substantive law, the concept of unfair competition, emerged.

There was and is no integration between the *antitrust* concept of monopoly, and the new concept of *unfair competition*. And here is the intrinsic dichotomy:

Speaking practically, only a very big[22] corporation can monopolize, or dangerously attempt to monopolize, some business activity and thus fall foul of the *antitrust* laws.

But a single individual, or a partnership, or a small corporation—any little[23] business enterprise of any kind—can engage in *unfair competition*.

---

[22] In the years since 1914 the *antitrust*, or monopoly, cases have almost invariably involved big, nationally known, corporations. *No* antitrust case brought *only* against natural persons, or partnerships, comes to our mind or memory.

[23] But in the years since 1914 the Commission's records are replete with many *unfair competition* proceedings brought against natural persons, partnerships, and small, relatively unknown, corporations.

And, as it were at the eleventh hour, this new concept of unfair competition was patched[24] into the already existing draft of the Federal Trade Commission Act. In consequence it is wholly self-contained, and it is to be found in its entirety within one single section—Section 5.

With respect to Section 5, which appeared in the *third*, or final, bill, it was stated by the Managers for the Senate and for the House of Representatives (H.R. Report, #1142, 63rd Congress, 2nd Session, page 18) that Section 5 dealt with "unfair methods of competition * * * and empowers the commission, after hearing, to order the discontinuance of the use of such methods."

The prior and unquestionably *antitrust* laws could be enforced only in the courts, both then and now.

The Managers clearly advised both the Senate and the House of Representatives—doubtless by analogy to the familiar procedure of the unquestionably antitrust laws—that likewise in all matters involving the new Section 5 the Commission could not enforce its orders except through the courts. Their statement (H.R. Report #1142, 63rd Congress, 2nd Session, page 19) follows (emphasis supplied):

> "*The orders of the commission will be enforceable only through the courts.* In order to obtain the speediest settlement of disputed questions, it is provided that the commission shall apply for the enforcement of its orders directly to the circuit court of appeals. * * * *The judgment of the circuit court of appeals will be final*, subject only to review by the Supreme Court upon writ of certiorari.
>
> "This section is entirely new to the House bill, but it appeared in a somewhat similar form in the

[24] Int. Salt, R. 75.

Senate bill, and the managers on the part of the House believed it wise to accept the provision in the form in which it now appears."

3. In Conclusion—resumé of the two categories.

We think the foregoing legal history has made it clear that when Congress enacted the Federal Trade Commission Act, it specifically divided the duties and powers of the new Commission into *two* quite separate categories.

Historically, the *first* category was the pre-existing power of investigation and of publicity in *antitrust* matters—essentially a mere continuance of the former powers of the old Bureau of Corporations, but added to a portion of this old *antitrust* power, under Section 6(b), was the new $100 a day forfeiture provision, which is now to be found in the third unnumbered paragraph of Section 10 of the Act.

The *second* and quite different category of power granted to the Federal Trade Commission, almost as an afterthought, was the wholly new *unfair competition* power. It appeared only in Section 5 of the new Act, and it also was wholly self-contained within that single section, both as to its enforcement and penalties. And one must never lose sight of the fact that, in the words of the Managers' Report, the cease and desist orders of the Commission under this new Section 5 were to be "enforceable *only* through the Courts." And the Court's judgment was to be "*final.*"

C. Textual Analysis of the Sections Involved.

A textual analysis of the Act, with particular emphasis upon Sections 5, 6, and 10, leads, we submit, with equal clearness to the same conclusion as was reached by both of the courts below. We respectfully present such an analysis for the consideration of this Court.

1. Section 6—The Old Antitrust Investigatory Section.

Section 6 provides only for the *antitrust* investigatory powers and duties of the Commission, and confers them *only* with respect to *corporations*, as has already been intimated.

Sections 5 and 6 are textually wholly independent of each other, as will be further discussed below. Section 5 does not anywhere refer to Section 6. No reference is made anywhere in Section 6 to Section 5. And, as will be shown, Section 6 is wholly investigatory and antitrust, and contains nothing having to do with the enforcement of cease and desist orders in unfair competition cases.

a. Subsection (a) of Section 6 gives the Commission power

> "To gather and compile information concerning, and to investigate * * * the organization, business, conduct, practices, and management of any corporation * * * and its relation to other corporations and to individuals, associations and partnerships."

This phraseology was derived practically verbatim from Section 6 of the Act of February 14, 1903, the old Bureau of Corporations, as has already been stated above.

There are *three* requirements ~~which~~ must be observed by the Commission if it is to claim any antitrust power under this subsection. First, its purpose must be solely to gather and compile information, or to investigate the affairs of the corporation involved. Second, such investigatory proceedings must involve only a corporation. Unlike Section 5, persons and partnerships cannot be the subject of a Section 6, subsection (a) investigation for the historical reasons already told. Third, the affairs of a corporation can be investigated only as those affairs relate to *other* corporations, individuals, etc. The individual

activities of a corporation as such, separately and *in vacuo* cannot be independently explored.

Finally, it should be noted that subsection (a) does not specifically impose any duty upon any corporation (or corporate officer) to give any information to the Commission.

b. Subsection (b) of Section 6 gives to the Commission the power

> "To require, by general or special orders, corporations, * * * or any class of them, or any of them * * * to file with the Commission * * * annual or special, or both annual and special, reports or answers in writing to specific questions * * *."

which will inform the Commission regarding the business affairs of those corporations, and the "relation" thereof "to *other* corporations, partnerships and individuals * * *."

For the Commission to exercise antitrust power under this subsection, there are *four* requirements. First, the Commission must enter a general or a special order. Second, (and again unlike Section 5) only corporations can be proceeded against. Third, only annual or special reports, or answers in writing to specific questions, can be demanded. Fourth, those reports or specific questions can concern only the general affairs of a corporation in its "relation" to others. *No power is conferred to exact gifts of expensive books.*

We shall continue below a further discussion of this subsection.

c. Subsection (c) of Section 6 gives to the Commission the power to make an investigation of compliance

with *antitrust* decrees, and, upon request of the Attorney General, it has the duty to make such an investigation in such cases.

This subsection is significant because (1) it contains the *only* language in Section 6 which refers to the Commission's investigation of corporate combination with *any* court decrees already entered; and (2) its limited language pertains solely and specifically to Department of Justice litigation in the name of the United States, under the *antitrust* laws, resulting in a final court decree. Most significantly, it omits any reference to compliance with the Commission's cease and desist orders under Section 5.

(It is obvious, therefore, that any power over enforcement proceedings, or the investigation of compliance with the Commission's cease and desist orders under Section 5, or of the Circuit Court's ensuing decrees, must be sought for solely and wholly in the provisions of Section 5.)

d. Subsections (d) and (e) of Section 6 refer to the duty of the Commission to investigate alleged violations by corporations of the *antitrust* laws, at the instigation of the President, the Congress, or the Attorney General, as contrasted to investigations of the same sort made on the Commission's own motion. Again (unlike Section 5), these subsections refer only to alleged corporate violators.

e. Subsection (f) of Section 6 refers to the publication of information generally, and to the making by the Commission of annual and special reports to the Congress with respect to the information obtained by it.

Subsection (f) then, is likewise clearly consistent with and gives further proof of, the single and logical antitrust purpose covered by Section 6—to obtain informa-

tion of a general nature, concerning corporations only, for the guidance of other branches of the government, but not to empower the Commission to require information looking toward the enforcement of any court decree or of any of the Commission's cease and desist orders already entered—except a court's final decree in one special kind of an *antitrust* case.

f. This conclusion is further fortified by subsection (h) of Section 6, which provides for the investigation of trade conditions in and with foreign countries, as affected by combinations, etc., and for consequent reports and recommendations to be made by the Commission to the Congress.

To the same effect Professor Beer (*Federal Trade Commission Proceedings*) writes at pages 15-16:

> "Under Section 6, the Commission has conducted many worth-while and valuable studies into various aspects of our economic structure, and these reports of the Commission have furnished much helpful and indispensable information to the Congress and the business world and have resulted in the enactment of remedial federal statutes."

And rather recently, in *Humphrey's Executor* v. *U. S.*, 295 U. S. 602, this Court noted at page 624 that Section 6 of the Act created "wide powers of investigation" under which the Commission "must report to Congress with the recommendations. Many such investigations have been made, and some have served as the basis of congressional legislation." This Court, which had just previously mentioned and analyzed Section 5, did not intimate that there is any interrelationship between Section 6 and Section 5. The same is true at page 628, where this

Court returns again to mention both Sections 5 and 6, and says of the latter section:

> "• • • In making investigations, and reports thereon for the information of Congress under [6], in aid of the legislative power, it acts as a legislative agency. • • •"

2. The Commission's Own Interpretation of the Nature of Section 6.

The interpretation which we have given to Section 6 of the Act is entirely consonant with the Commission's own interpretation during the approximately thirty-four years which have elapsed since the Act was passed.

It is also consonant with the official description which the Commission has set down in its own officially published statement concerning its own "Organization, Procedures, and Functions" as required by the provisions of the Administrative Procedure Act. The material to which we are about to refer was published in a pamphlet prepared by the Commission, dated November 20, 1947, and numbered Section 17.[25]

Under the caption "GENERAL ECONOMIC SURVEYS AND REPORTS" the Commission refers for the source of its power *only* to Section 6 of the Act. It states that "These functions of the Commission are performed by its Bureau of Industrial Economics".

The Commission further states, "The administration of this Bureau is conducted by a Director who is also the Chief Economist, and by a Chief Accountant, a Chief Statistician and an Assistant Chief Economist who are Assistant Directors of the Bureau."

---

[25] Section 17 is printed in full, above, at pages 7-9.

The very name of this Bureau of the Commission and the titles of the various higher officials in this Bureau, all of whom are concerned only with Section 6 of the Act, repel the possibility of advancing any serious claim that the legal problems incident to the enforcement of a cease and desist order are committed to their charge.

Indeed, with obvious reference to Section 6(e) of the Act, the Commission states, under the aforesaid caption, that its concern with a final decree entered against a corporate defendant "*under the Antitrust Acts*" is, *first*, "*to ascertain* and report the *economic* effects of such decree • • •." The Commission then refers to "these general economic surveys" and states that their purposes "are to ascertain and report the facts to the President or to the Congress concerning general economic conditions • • •." It is further stated that "Such general economic surveys are made in response to the request of the President, the direction of the Congress, or upon the initiative of the Commission."

The Commission then refers with pride to "the economic and business facts" which it has developed and it states that it has disclosed "uneconomic • • • practices."

The Commission further states that its Bureau of Industrial Economics "also furnishes general economic information" and that it prepares "economic, and statistical analyses • • •." The personnel of this Bureau is said to include "accountants, economists and statisticians • • •."

This forthright acknowledgment that the statutory language pertains to reports incidental to general *economic* investigations does not assist the Commission's present claim that investigations ancillary to a prior cease and

desist order and in aid of its enforcement are permitted by the same Rule Section 17 and may also be demanded by its Division of Compliance for that purpose. Such a Rule could hardly be permissive of both. Investigations to acquire data as a basis for the formulation of economic or statistical reports or policies are not only necessarily distinguished, but also comprise a species differing vastly, from those which constitute a preliminary step in the enforcement process.

Nowhere in these official references to the work of the Commission under Section 6 is there any mention made of compliance or enforcement proceedings, nor is any reference to be found to the Division of Compliance, whose duties as to "Compliance and Enforcement" of final cease and desist orders under Section 5 will be discussed hereinbelow. The latter are published and described by the Commission in an entirely different procedural section.

For many years the Commission itself has confined its application and interpretation of Section 6 to general economic and antitrust surveys, which is a delegated *legislative* function. To attempt now, at this late date, to transform such authority into an alleged established practice necessary to the enforcement aspects of the Commission's activity is certainly of questionable validity, to put it mildly.

The prior policy statements of the Commission have consistently confined its claimed powers under Section 6 to the area of economic and antitrust surveys. Thus, the Commission's Annual Report for 1932 (pp. 1-4) said of Section 6:

> "In pursuance of Section 6 the Commission conducts general investigations at the request of the President, either house of Congress, and the Attor-

> ney General, and makes reports in aid of legislation and in regard to alleged violations of the antitrust act."

Similarly, in 1940, while describing an economic survey (Annual Report of the Federal Trade Commission for 1940, pages 17-18), the Commission said:

> "* * * A Commission resolution * * * authorized the periodic collection of annual or special reports * * * all in accordance with the powers * * * in section 6 * * *. The information is to be compiled with a view to developing and publishing the significant facts regarding the general trend of, or change in, the economic situation * * * essentially a factual presentation of basic industry data."

From these illustrations of the Commission's own declarations, it does not appear that in the past the Commission has ever believed Section 6(b) to be inclusive of the power here sought to be asserted. Always heretofore the Commission has consistently declared that economic and antitrust surveys are the varieties of investigation contemplated by Section 6.

It is of considerable importance to note that, nearly a quarter of a century ago, the Federal Trade Commission was advised at its own request by the Attorney General of the United States that the provisions of Section 6(b) are precedural and add nothing to the power to undertake investigations conferred by Sections 6(a) and 6(d). Furthermore, in this opinion the Attorney General of the United States held that such investigations as the Commission might make must be strictly confined to alleged violations of the Antitrust Acts by corporations. We refer to an opinion dated October 24, 1925, which is to be found

in Volume 34 of the Official Opinions of the Attorneys General of the United States, commencing at page 553.

Under four designated resolutions of the United States Senate the Federal Trade Commission had been requested to conduct certain investigations. Thereupon the Commission wrote to the President, asking certain questions as to its powers of investigation under Sections 6(a), (b), and (d) of the Act. The President transmitted this inquiry to the Attorney General, who thereupon expressed his opinion as to the scope of these investigatory powers.

The material parts of the Attorney General's opinions are as follows. At pages 557-558, he stated:

> "A *main* purpose of the Federal Trade Commission Act was to enable Congress, through the Trade Commission, to obtain full information concerning conditions in industry to aid it in its duty of enacting legislation. That purpose was emphasized in the proceedings attending the passage of the Act (S. Rep. 583, 63d Cong., 2d sess., S. Rep. 597, 63d Cong., 2d sess.); and in the debates the Commission was sometimes likened to a Committee of Congress (statement by Congressman Stevens, 51 Cong. Rec. 14935).
>
> "Resolutions directing investigations pursuant to section 6, subsection (d), are to be limited in their scope to the ascertainment of facts which reasonably and logically tend to show whether or not the *Antitrust* Acts are being violated by any *corporation*. The existence or nonexistence of a violation of such acts may be disclosed by acts committed by the *corporations* under investigation and the effect of such acts upon interstate trade and commerce. The investigations should not in any case be enlarged to include an inquiry into any matter which does not have a direct bearing upon

the question whether interstate trade and commerce are being unlawfully monopolized or restrained." (Emphasis supplied.)

At page 563 the Attorney General expressed the opinion that the powers of the Commission were quite limited, saying:

> "There is serious question, however, as to the requirement that the Federal Trade Commission shall ascertain and report the efforts, if any, made by the corporations in question, through the expenditure of money or through the control of avenues of publicity,
>
> "'to influence or control public opinion on the question of municipal or public ownership of the means by which power is developed and electric energy is generated and distributed.'
>
> "The relationship of such facts, assuming their existence, to a charge of violation of the *antitrust* acts is not apparent. Indulging all presumptions in favor of the validity of the resolution under the Organic Act, I am still unable to find authority for such an inquiry. All other features of the investigation properly may be made." (Emphasis supplied.)

Towards the conclusion of his opinion, the Attorney General expressed the following further opinions as to the limitation of the investigatory powers of the Federal Trade Commission under Section 6:

> "You will recognize that I can not forecast all of the problems which may arise in carrying out the somewhat vague directions of the resolutions. Minor questions as they arise should be resolved by the Commission in the light of the principles

> set out in this opinion. The test whether or not a particular line of inquiry should be followed would seem in each instance to be whether it will disclose material evidence of a violation of the *antitrust* acts." (Emphasis supplied.)

and, most important of all:

> "The provisions of [Section 6] subsection (b) are procedural and add nothing to the power to undertake investigations conferred by subsections (a) and (d)."

Because this opinion was sought by the Commission from the Attorney General, and because the Commission for almost a quarter of a century thereafter and until the present time has limited its own conduct and exercise of its investigatory powers under Section 6 to the limited scope advised by the Attorney General, we submit that this opinion is of the greatest importance, and that it supports and reinforces the correctness of the statutory interpretation expressed by the courts below as to the narrow scope of Section 6.

Perhaps the strongest argument against the Commission's novel claim that its rule-making authority extends to all sections of the Act finds an illustration in the legal history of Section 6(a) of the Wool Products Labeling Act of 1939. That section provided in the first instance that the Wool Act is to be enforced by the Commission under the rules, regulations and procedures provided for in the Federal Trade Commission Act. However, a later paragraph within the section indicates that the draftsman entertained a doubt as to its breadth, reading:

> "* * * the Commission is authorized and directed to make rules and regulations for the manner and

> form of *disclosing information* required by this Act, * * * and to make such further rules and regulations under and in pursuance of the terms of this Act as may be *necessary* and proper for administration and enforcement." (Emphasis added.)

Why was this additional grant of power deemed necessary?

Proponents of the Wool Act desired the power to compel affirmative disclosures relative to the subject matter falling within the ambit of that Act's administration. (Compulsory disclosure is also the essential feature of compliance reports.)

Therefore, it would appear that the rule-making authority contained in Section 6(g) of the Federal Trade Commission Act was deemed inadequate for the purposes of the Wool Act. Otherwise, the added grant in the Wool Act would not have been urged or required.

The fact that the rule-making power of the Federal Trade Commission Act springs from a subsection to a provision dealing with antitrust powers of investigation, and used historically by the Commission only in connection with general economic investigations, presumably created a fear in the mind of the draftsman of the Wool Act that the application of Section 6(g) was limited to the area covered by Section 6. But the opponents of the measure expressed a contrary belief; *i.e.*, that the "rules, regulations and procedure" of Section 6(g) of the Federal Trade Commission Act were sufficient.

The Wool Act as it stands was passed in the face of such opposition. (84 Cong. Rec. 9657.) From this legal history we conclude that the rules of practice emanating from Section 6(g) are confined to matters falling within the scope of Section 6, notwithstanding the words

"* * * for the purpose of carrying out the provisions of this Act."[26]

Another basis for limiting this seemingly broad language lies within the terms of subsection (g) itself. "From time to time to classify corporations * * *" would seem to be intended to qualify the words "and to make rules * * *" especially when this Court remembers that the final Congressional purpose of classifying corporations was to obviate unnecessary routine annual reports, and facilitate an adequate means of *antitrust* surveillance in order, *inter alia*, to apprise Congress of economic facts and to enable the President to recommend legislation. Thus, subsection (g) would appear to be akin to and contemplative of the general economic activity attributed by all the previous authorities to Section 6. Why, then, should the remainder of the sentence "* * * and to make rules * * *" be treated as an entirely disconnected and illogical grant of general power, when otherwise Section 6 and its subsections constitute a well-integrated and logical entity?[27]

In conclusion, it might also be mentioned that the Commerce Clearing House Reports, Volume 3, concerning Federal Trade Commission investigations, publish the releases of the Commission regarding its general economic

---

[26] The petitioner asserts, citing four cases (brief, p. 51), that three courts have sustained a general rule-making power under section 6(g). But an examination of those cases shows that in no instance was there a challenge to the *power* of the Commission to make general rules. Therefore each Court assumed the existence of such a power, in the absence of any such challenge. We submit that what those courts said, *en passant*, was tantamount to dictum.

[27] As the court below pointed out, Int. Salt, R. 75, when section 5 was patched into the Act, the draftsman overlooked the word "Act" in section 6(g), and "there was a failure to remove or modify" that word.

investigations and its general investigations regarding possible antitrust violations. In these releases in which specific reference is made by the Commission to the law, reference is always made to Section 6 of the Act. There is no release published therein of *any* investigations made, either purportedly under Section 6, or under any other section of the Act, which involve either alleged violations of a Commission's cease and desist order under Section 5, or of a Court of Appeals' ensuing decree.

3. Section 5—The New Unfair Competition Section.

a. Consistent reference is made throughout all subsections of Section 5 to "persons, partnerships, or corporations." This is in contrast to Section 6, where consistent reference is made exclusively to "corporations", but never to "persons, partnerships, or corporations." The reason for this is historical, as has been demonstrated.

b. Subsection (b) of Section 5 describes the jurisdiction and procedure pursuant to which the Commission may prosecute acts involving the unfair methods of competition prohibited by subsection (a).

The last two sentences of subsection (b) are extremely significant in establishing the final nature of the Court of Appeals' ultimate decree. Those two sentences make it entirely clear that the Commission may, on due notice and hearing in the manner prescribed, "modify or set aside, in whole or in part, any report or any order made or issued by it under this section" at any time *until* the transcript of the record in any given case has been filed in a court of appeals in connection with an appeal by a respondent against whom a cease and desist order has been entered.

In other words, the freedom of the Commission to do as it will with its own cease and desist order (except for due procedural requirements) is unrestricted up to the moment when a court of appeals has obtained jurisdiction by the filing of a transcript on appeal. Such power then terminates: Beer, *Federal Trade Commission Proceedings*, p. 428.

This restriction on the power of the Commission, because of the *finality* then to be attributed to its order, is further emphasized by subsections (g), (h), (i) and (j) of Section 5, which subsections deal with various possible procedural variations in order to fix the point of time of the *finality* of a Commission cease and desist order. In none of those subsections except in (g)(1), when there has been *no Court order*) is there a reservation of any power to the Commission to do anything with its cease and desist order once that order has become *final* as therein severally provided.

c. Subsection (c) of Section 5 provides the appellate procedure available to a respondent against whom a cease and desist order has been entered. That subsection is replete with jurisdictional language, and that language speaks in terms only and always of Court jurisdiction and not of Commission jurisdiction. The following examples are important:

> "Upon such filing of the petition and transcript the court shall have jurisdiction of the proceeding and of the question determined therein, and shall have power to make and enter upon the pleadings, evidence, and proceedings set forth in such transcript a decree affirming, modifying, or setting aside the order of the Commission, and enforcing the same to the extent that such order is affirmed, and

> to issue such writs as are ancillary to its jurisdiction or are necessary in its judgment to prevent injury to the public or to competitors *pendente lite*."

This language, in the case of a judicial affirmance or modification, obviously contemplates the possibility of a claim concerning the dual existence of (1) a subordinate affirmed (or modified) cease and desist order of the Commission, and (2) of a separate and superior decree of the Court. Because of this conceivable theoretical duality the enforcement language was clearly intended to lay at rest in advance any such conflict. The legal survivor is the Court's decree alone:

> "To the extent that the order of the Commission is affirmed, the court shall thereupon issue its own order commanding obedience to the terms of such order of the Commission."

This sentence concerning the monism of the Court's own final order is followed by a retrospective passage of draftsmanship which contemplates possible procedure during the antecedent hearing—a provision for taking additional evidence upon that hearing. It should, however, be noted that, even in such an event, once the Court has acquired jurisdiction, its jurisdiction is *exclusive*. This is necessarily so because of the statutory provision that the party desiring to adduce additional evidence, be it the Commission or the respondent, must first obtain leave of the Court for such additional evidence to be taken by the Commission, but only as an arm of the Court, and only on such terms and conditions as the Court, not the Commission, may prescribe. And while in connection with adducing such additional evidence, the Commission

may modify its findings or make new findings, and may make—note this carefully limited word—"its *recommendation*, if any, for the modification or setting aside of its original order", the Commission is not empowered, even under such circumstances, to modify or set aside its original cease and desist order. Only the Court has such power, because the Court has exclusive jurisdiction.

Clearly, therefore, the Court's jurisdiction is exclusive. Clearly, therefore, once the Court's jurisdiction has attached, the Commission's jurisdiction is *functus officio*.

The foregoing conclusion is, finally, buttressed by the plain phraseology with which this subsection concludes. The last sentence of subsection (c) provides explicitly that the decree of the court of appeals "shall be final," except when this Supreme Court on *certiorari* may change it.

d. Subsection (d) of Section 5 provides that

> "The jurisdiction of the circuit court of appeals of the United States to affirm, enforce, modify, or set aside orders of the Commission shall be exclusive."

It was the purpose of the Congress in enacting subsection (d) to emphasize the position for which the respondent contends, that "The jurisdiction of the circuit court of appeals * * * to * * * enforce, [or] modify * * * orders of the Commission [is] exclusive."

And we respectfully urge, that this single subsection (d) of Section 5 is in itself conclusive and decisive of the present dispute, as we think the Courts below correctly held.

In consequence, we submit that the Commission had no power to modify or to attempt to enforce its original

cease and desist order of 1943, independently of the Court of Appeals.

And in final consequence, we submit that the lower Courts correctly held that no District Court had any jurisdiction over this forfeiture case, because the enforcement jurisdiction of the Court of Appeals is "exclusive". Cf. Beer, *Federal Trade Commission Proceedings*, pp. 418, 428, 429.

e. Subsection (l) of Section 5 was not in the original Act. It also deals with the *finality* of a cease and desist order under the new procedural provisions of 1938. It provides that each violation of a cease and desist order "after it has become final," shall entail a civil penalty of $5,000.00, to be recovered in a civil action brought by the United States. In this connection, Section 16, also new in 1938, provides that where a "person, partnership or corporation" is liable to such a penalty, in the opinion of the Commission, the Commission "shall certify the facts to the Attorney General", who shall "cause appropriate proceedings to be brought for the enforcement of the" penalty. Expressly, however, there is no reference to Section 10.

The amendments of March 21, 1938, were designed basically and primarily to relieve the Commission of the routine necessity of going to the Circuit Court of Appeals (as was the case prior to 1938), in each and every instance, before it could become empowered to enforce its cease and desist orders.

Prior to the 1938 amendments, the courts had held time and again that a Commission cease and desist order could not be enforced by the Commission except by first obtaining an enforcement decree from a circuit court of appeals: *Federal Trade Commission* v. *Balme*, 23 F. (2d) 615; cert.

denied, 277 U. S. 598; *Federal Trade Commission* v. *Standard Education Society*, 86 F. (2d) 692.

Even where a respondent had appealed to the Court and lost, the Commission still could not enforce its cease and desist order unless it also had filed a cross-appeal or a separate petition for enforcement: *Federal Trade Commission* v. *Fairyfoot Products Co.*, 94 F. (2d) 844. The Seventh Circuit had even ruled that no enforcement decree would be entered at all unless there was proof of a violation of the Commission's cease and desist order: *Federal Trade Commission* v. *Morrissey*, 47 F. (2d) 101; *Federal Trade Commission* v. *Standard Education Society*, 14 F. (2d) 947.

Consequently, now that under the 1938 amendments a cease and desist order automatically becomes *final*, upon the expiration of the time for appeal, if no appeal is taken, no Circuit Court of Appeals would ever gain any jurisdiction, under such circumstances, to enforce such cease and desist orders. Necessarily and obviously, therefore, subsection (l) was added in 1938 primarily in order to provide an appropriate method of enforcing such "automatic" cease and desist orders under the new "automatic" provision.

We know of no evidence which even indicates that the Congress, in 1938, intended to upset the then 24 year old statutory scheme of court enforcement. Rather the Congress, in 1938, was legislating almost interstitially on that topic. Whether or not subsection (l) is ambiguous[28] is, we submit, a question quite apart from the problems to be decided and necessarily involved in this case. Subsection (l) is not involved in this case because (1) the Commission does not claim to be proceeding under its authority,

[28] Cf. Beer, *Federal Trade Law and Practice*, 480.

and (2) the Commission has never claimed that this respondent has in any way violated the law since the cease and desist order was modified and, as modified, affirmed, in 1943.

4. Section 10—Particularly the Forfeiture Provision.

Section 10 contains four unnumbered paragraphs which provide four different kinds of penalties applicable to four distinct types of violations of the Act.

a. The first unnumbered paragraph is directed only against "Any *person* who" improperly refuses to testify or produce documentary evidence. The penalty is a fine or imprisonment, or both. Corporations are not involved under this paragraph. It is not otherwise material here.

b. The second unnumbered paragraph, like the first, is directed only against "Any *person* who", and not against corporations. It provides for a fine or imprisonment, or both, if such person falsifies corporate reports, etc. It is not otherwise material here.

c. The third unnumbered paragraph provides for the forfeiture of $100.00 per day, *not* by "any *person* who", but *only* by "any *corporation* required by this Act to file any annual or special report * * *." The forfeiture applies, therefore, only if the failure is a corporate failure, but not if it is a personal or a partnership failure, to file an annual or special report required by the Act.

(i) Section 5 expressly envisages proceedings against *persons* or *partnerships* as well as against corporations, yet this $ 00.00 *per diem* forfeiture paragraph in Section 10 relates *only* to *corporations*. This is hardly consistent with any claim that Section 10 was intended and devised

by the Congress so as to be a general aid in enforcing Section 5.

(ii) The only section of the Act under which the Commission is given the express power to require a corporation to file annual or special reports is Section 6, subsection (b).

Any other failure or violation is immune to the forfeiture of Section 10, which is hardly consistent with the claim that it constitutes a general enforcement section. See the companion cases of *Federal Trade Commission* v. *National Biscuit Co.*, 18 F. Supp. 667; *United States* v. *National Biscuit Co.*, 25 F. Supp. 329.

(iii) No case has been found where any attempt was made to use Section 10 except in aid of Section 6, and the Commission has filed nothing under the Administrative Procedure Act to warrant a different conclusion.

(iv) Section 5, as has been mentioned above, is quite self-sufficient as to enforcement procedure.

(v) Therefore it would seem that unless the "additional and supplemental" report mentioned in the Commission's purported enforcement order of September 2, 1947, was genuinely and *bona fide* an "annual" or "special" report within the lawful intendment of Section 6(b),[29] the forfeiture provision of the third paragraph of Section 10 cannot be invoked in order to support the Commission in the present case.

The Commission has, moreover, made it quite clear through the Chief of its Division of Compliance, that it

[29] Note, that the $100.00 forfeiture does *not* apply to any failure to give answers in writing to specific questions, which are also provided for in Section 6(b); *U. S.* v. *National Biscuit Co.*, 25 F. Supp. 329, 331.

is *not* proceeding under Section 6;[30] it is simply continuing Docket No. 4320, which is, and always has been, exclusively under Section 5. Nor is the Commission attempting to commence a *new* prosecution under Section 5; it claims merely to be continuing an old case under Section 5.

Clearly, therefore, the forfeiture provided for in the third unnumbered paragraph of Section 10 is not applicable to this respondent.

d. The penalty provided in the *fourth* unnumbered paragraph is against officers and employees of the Federal Trade Commission. It is not at all material here.

5. Résumé—Sections 5 and 6 Are Not Related, But Independent.

The principal reasons which demonstrate that this assertion is true:—

(a) There is no cross-reference between them.

(b) Section 6 deals exclusively with corporations, so that it could not be invoked for enforcement of a Section 5 cease and desist order against an individual respondent, or against a partnership.

(c) The Rules of Practice, Statement of Policy, and Organization, Procedures and Functions of the Commission clearly indicate that the Commission has never regarded Section 6 as collateral to Section 5, nor can evidence be found of any prior judicial precedent, except one, where the Commission has even attempted to invoke Section 6 in aid of Section 5.

We refer to *Federal Trade Commission* v. *P. Lorillard & Co.*, 283 Fed. 999; aff'd *sub nomine*, *Federal Trade*

[30] Int. Salt, R. 36.

Commission v. *American Tobacco Co.*, 264 U. S. 298. That case was on its facts almost the reverse of this case.

In that case the Commission was attempting to use its Section 6 powers in aid of a proceeding just commenced, and possibly of a proceeding to be commenced (264 U. S. at p. 305) under Section 5. Both courts unanimously held against the Commission (although the point involved here was not decided, and seems not to have been advanced) but rather because the Commission's demands were so sweeping and so unreasonable that they violated the inhibitions of the Fourth Amendment against searches and seizures.

Indeed in the present case those same objections seem to be in point and to be quite valid; they are also relied on by this respondent, additionally.

(d) Section 6 lacks enforcement language except as to Department of Justice prosecutions resulting in *antitrust* decrees against *corporations*. The lack of specific enforcement powers or provisions in Section 6, with respect to Commission cease and desist orders under Section 5, is striking by its omission.

(e) The Congressional Committee reports (set forth above in this brief) clearly indicate that no relation exists between Sections 5 and 6.

(f) Section 5 is self-contained, and provides its own enforcement penalties, for "unfair competition."

(g) The $100 *per diem* forfeiture of the third paragraph of Section 10 refers only to *economic* investigations under Section 6(b).

(h) The Commission is erroneously and invalidly attempting to use the $100 *per diem* forfeiture as a lever,

in terrorem, of enforcement for Section 5, and in the endeavor to circumvent and to evade the lawful and retained exclusive jurisdiction of the Court of Appeals for the Seventh Circuit.

(i) Except as provided in that Court's final decree,[31] no independent jurisdictional fragment of this case has been left either to the Federal Trade Commission, or to any District Court.

II

The Commission's purported order of September 2, 1947, was invalid. It was predicated on Rule XXVI, paragraph (b), which, as applied to respondent in this case, is *ultra vires* and void.

Nevertheless respondent's further report constituted a compliance therewith.

We believe that our first point has sufficiently disposed of the controversy, and we think that probably it is not necessary to add to the burdens of this Court by going further into the rule-making powers, if any, of the Commission.

This is because

1. As we shall show below in sub-topic B, the Commission has adopted one inconsistent theory after another about Rule XXVI in the progress of this controversy; and

[31] The petitioner's brief admits, with commendable candor, that the 1943 order of the Court of Appeals left it quite open to the Commission to proceed in the District Court for the single $5,000 penalty under Section 5(1). (Petitioner's Brief, pp. 4, 24.) However, as we have pointed out, that question does not arise in this case, because the Commission is not seeking that penalty.

2. In consequence, the Commission devotes a trifle less than two pages (50-51) of its present brief to so perfunctory a defense of Rule XXVI that the Commission may be said to have abandoned the point, all but technically.

But because we cannot be absolutely sure whether or not this Court might want to give some consideration to this topic we have endeavored to brief it comprehensively.

The purported order of the Federal Trade Commission, dated September 2, 1947,[32] is primarily predicated upon the authority of Rule XXVI, subdivision (b).[33] (The order also purports secondarily to be supported by Section 6(a) and (b) of the Federal Trade Commission Act, but we hope that we have shown in Point I, above, that this purported secondary support is erroneous, unlawful and insufficient.)

If, therefore, Rule XXVI (b) is *ultra vires* and void, as applied to this respondent under the facts and circumstances of this case, then the primary support of the Commission's order of September 2, 1947, fails, and the order and Rule will fall simultaneously.

A. Background of Rule XXVI.

On August 11, 1947 (12 Fed. Reg. page 5450, Column 2) the Federal Trade Commission filed, and published on August 12, 1947 (12 Fed. Reg. pages 5444-5450), its Rules of Practice, including Rule XXVI, to be effective August 12, 1947.

The authority, declared and published, for making these rules, was stated (12 Fed. Reg. page 5444, top of Column 3) to be Section 6 of the Federal Trade Commission Act

[32] Int. Salt, R. 4-5.
[33] Int. Salt, R. 10; Petitioner's Brief, p. 65.

together with the Administrative Procedure Act (U. S. Code, Title 5, Ch. 19, Sec. 1001 *et seq.*).

The foregoing are the entire purported statutory supports for Rule XXVI. As printed in the Federal Register, and in the petitioner's brief, the first paragraph is lettered (a), the second paragraph is lettered (b), and the third paragraph is lettered (c). For convenience of reference, we adopt that lettering.

Subparagraph (a) of Rule XXVI simply provides for an *original* report of compliance. *No issue arises thereunder herein.*

Subparagraph (b) asserts the right of the Commission to require, from time to time, "*further*" reports of compliance. Subparagraph (c) is so subsidiary, dealing as it does with a matter of minor detail, that it may be passed by as immaterial. Petitioner's brief neither prints it nor notes its omission.

Rule XXVI is the only rule of the Federal Trade Commission which deals with compliance reports. Subparagraph (b) has apparently existed in slumber in various forms for some years,[34] but so far as our research shows:—

> 1. No court has ever yet declared this rule to be lawful, valid and enforceable; and
>
> 2. Not until the present time, almost thirty-four years after the enactment of the Federal Trade Commission Act, has any administrative attempt been made by the officials of the Federal Trade Commission to enforce subparagraph (b) in a Section 5 proceeding.

[34] The Commission's Brief below asserted (p. 17) that it dates back to October 2, 1937, in "substantially the same" form. Its present brief (p. 49) asserts that it goes back to 1936.

This consideration is of great importance because of the rule of statutory construction relative to non-user of alleged powers. In *Federal Trade Commission* v. *Bunte Bros.*, 312 U. S. 349, this Court said at page 352:

> "* * * as established practice may shed light on the extent of power conveyed by general statutory language, so the want of assertion of power by those who presumably would be alert to exercise it, is equally significant in determining whether such power was actually conferred."

In the first place Rule XXVI(b) is anomalous in principle.

All litigation ends in a final judgment, just as in the present case the original proceeding of the Federal Trade Commission ended in a final decree of the Court of Appeals.

Likewise special proceedings end in the issuance of a writ of the court; for example, an injunction or a mandamus.

In no instance of private litigation known to the writer of this brief is a defendant or a respondent, after the end of a case or of a special proceeding, required to report in writing to his adversary whether he has paid the judgment, or whether he has obeyed the commands contained in the writ of injunction or of mandamus.

Other enforcement methods are provided by law for the enforcement of judgments and decrees. Similarly and in the present case two remedies exist, if it should ever be claimed, and if it should ever be proven in a court of law, that respondent has violated the 1943 decree of the Court of Appeals, viz.:

1. Contempt of court; or

> 2. The civil penalty of not more than $5,000 for each violation of a final cease and desist order, which is set forth in Section 5(l) of the Act.

Nearly a quarter of a century ago, Mr. Henderson (*The Federal Trade Commission*, at p. 77), had noted this anomaly.

Referring to the final cease and desist order he stated:

> "• • • with the issuance and service of the order, the case is complete. • • •"

Professor Beer agrees: *Federal Trade Commission Proceedings*, p. 429. Mr. Henderson then went on to observe that

> "• • • The Commission has, however, added an interesting postscript to the statutory procedure. • • • [to order a compliance report] • • • *there is no express statutory authority to issue such an order.* • • •." (Emphasis supplied.)

While there is no claim by the respondent herein, under the facts and circumstances of this particular case, that subparagraph (a) of Rule XXVI is invalid, we believe that we shall show that subparagraph (b) of this rule is *ultra vires* and void.

One further point arises which must also be mentioned here, before proceeding with the discussion of Rule XXVI(b).

The enactment of the Administrative Procedure Act (U. S. Code, Title 5, Sec. 1001, *et seq.*) on June 11, 1946, required the various Federal commissions and bureaus to prepare and publish a statement of their procedure, explicitly and definitely, because, under the provisions of that Act only published procedure, definitely and

explicitly stated, is lawful (§1002(a), last sentence; cf. §1005(b); §1008(a)).

Accordingly, and at some unknown date in 1947, the Federal Trade Commission created a new Division of Compliance, subordinate to the General Counsel of the Commission, and under the supervision of an Assistant General Counsel. The published statement, which first mentions this new Division of Compliance, is dated August 11, 1947, and was published the following day. (Organization, Procedures and Functions of the Federal Trade Commission; Section 12(c) thereof; 12 Fed. Register, p. 5452.)

At that same time the Commission published in its said statement of Organization and Procedures a new organizational section, Section 12, of which Section (c) forms a part. Section 12 also contained a subparagraph (a) of which only the first two sentences are material here. We quote them and they are as follow (emphasis supplied):

> "Sec. 12(a) Reports of compliance with orders to cease and desist are required in accordance with the provisions of Rule XXVI of the Rules of Practice. The Commission may by order require such *supplemental* reports of compliance as it considers warranted." (Note: no "*additional*" reports are mentioned. Clearly, therefore, they cannot lawfully be required).

We think it probable that when the organizational and procedural Section 12(a) was originally drafted, earlier in 1947, and adopted by the Commission, it did not even then intend to put on that Section the construction for which it now contends.

In previous pages of this brief we have directed the Court's attention to the fact that this respondent's original

report of compliance, dated July 12, 1943,[35] was not rejected by the Commission, but, instead, was received and retained by the Commission without objection. In the past the Commission has rejected, or has indicated that it claims the power to reject, an original report of compliance which it claims to be insufficient in whole or in some respect.

Western Meat Co. v. *Federal Trade Commission*, 33 F. (2d) 824, 825, 827. See also Commissioner Freer's article in 8 Geo. Washington L.R., 316, 336. Also appellants' brief below, page 59.

If, therefore, the Commission should reject an *original* compliance report as being insufficient or incomplete, what would be the orderly way to proceed thereafter?

The orderly method of procedure would be for the Commission to reject the report until it was complete. That is, the Commission would promptly ask for more to be added to the original report—for "supplemental reports". *And that is the exact and responsive phraseology of the second sentence of Section 12(a).*

We urge, in consequence, that when Section 12(a) was drafted and adopted the Commission intended to put upon it only the interpretation which we have just set forth, and not the sudden, novel and forced interpretation for which it now contends.

We believe that the accuracy of our interpretation is supported by the fact that for almost thirty-four years the Commission never claimed nor sought the novel power for which it now suddenly contends.

This new Division of Compliance has now apparently decided to attempt to create new law and novel forms of procedure, and to claim to have and to exercise powers

[35] Int. Salt, R. 32-35.

which for the last thirty-four years the Federal Trade Commission does not seem ever actively to have claimed to have or actively to have attempted to exercise.

B. Rule XXVI(b) Is Not Authorized by Law.

The retreat of the Commission from one legal position to another reveals the weakness of its arguments in support of Rule XXVI(b). The Commission's complaint explicitly relies upon Rule XXVI and Sections 6(a) and 6(b) as the legal basis for the "additional" reports.[26] No assertion is contained in that pleading, which forms the foundation equally of the present case, the motion below and the subsequent appeal, as to the possible existence of a vague power, to be implied either from Section 5 or from a construction of the Act as a whole.

In fact, the Commission has further precluded the courts below and this court from taking such a view by declaring in its argument below that Rule XXVI, promulgated "in accordance with" the alleged rule-making power of Section 6(g), constituted an *implementation* of Section 6(b) (Plaintiff's brief in the District Court below in support of motion for summary judgment, page 3).

Petitioner cannot therefore properly ask this court to hold that Rule XXVI rests on some other vague "inherent power,"[27] because it has taken a contrary position in its complaint, as mentioned, and because no such argument was addressed to the District Court below.

No rule of law is better settled than that an appellant cannot, for the first time, on an appeal, take a position which it did not plead, and contrary to what it argued, before the original court below.

---

[26] Int. Salt, R. 3, paragraph #4.
[27] Petitioner's Brief, p. 15.

Petition of Herschmann (C.C.A. 7), 163 F. (2d) 865, 867;

Meyer v. *W. R. Grace & Co.* (C.C.A. 7), 290 Fed. 785, 786;

Witiak v. *D. & H. R.R. Co.*, 153 F. (2d) 379, 381.

Notwithstanding this rule of law, the Commission shifted its legal position when it appealed from the District Court to the Court of Appeals. The Commission claimed twice in its "Statement of Points on Appeal" (Nos. 8 and 12)[38]; once in a point in its brief (Point III A; Appellant's Brief, pp. i, 9, 28) and at least eight times in the text of its brief (Pp. 11; 27—twice; 28—twice; 30; 32; 50) that it had "inherent" power to require such reports. Once it even advanced the rather desperate justification of "administrative necessity" (Appellant's brief, p. 28) and once the cognate excuse of "necessary authority" (*ib.*, p. 32).

Now, before this Court, except for the lurking and vestigial remnant of this line of argument just mentioned," it would seem to have been entirely abandoned.

The Commission would not have felt compelled to advance such vague claims if it were able to rest its argument upon the sure foundation of a statutory authorization.

By clear inference it appears that the Commission has been compelled to concede, as Mr. Henderson stated in the quotation from his book already mentioned, that "there is no express statutory authority to" support Rule XXVI, and particularly subparagraph (b).

Nor, we believe, does it advance the Commission's argument to claim authority for Rule XXVI (b) from the

[38] Int. Salt, R. 63, 64.

Commission's earliest usage with respect to *original* compliance reports.[39] This is because (1) this case does *not* involve an *original* compliance report; (2) respondents do not raise here, and did not raise below, any issue as to the lawfulness of *original* compliance reports; and, most importantly, (3) *there was no rule requiring any original compliance reports until years later!*[40] And the Commission both concedes that its "supplemental" report rule (XXVI-b) was not promulgated until 1936,[41] and does not deny that no serious attempt has ever been made to employ it until now.

In the light of the historical facts the claim of the Commission of a "long continued administrative construction"[42] would seem to diminish in substance to gossamer.

C. The Commission Has Failed to Comply With the Requirements of the Administrative Procedure Act of 1946. Consequently Rule XXVI(b) and the procedure envisaged therein are invalid and void.

Section 1002, subdivision (a) of the Administrative Procedure Act requires every "agency", as defined, which includes the Federal Trade Commission, to state and currently publish in the Federal Register its rules, procedures and statement of policy, and it further requires that all "*substantive* rules"—such as Rule XXVI—must be "adopted *as authorized by law.*" (Emphasis supplied.) Moreover, Section 1002(a) contains this very important concluding prohibition:

> "No person shall in any manner be required to resort to organization or procedure not so published."

---

[39] Petitioner's Brief, p. 48, n. 11.
[40] Beer, Federal Trade Law and Practice, 426 and n. 37.
[41] Petitioner's Brief, p. 49.
[42] Petitioner's Brief, pp. 11, 38, 48.

Section 1005, subdivision (b), of the Administrative Procedure Act, provides further as follows:

> "(b) *No process, requirement of a report,* inspection, *or other investigative act or demand shall be issued, made, or enforced in any manner or for any purpose except as authorized by law.* * * *" (Emphasis supplied.)

As we believe we have already shown, there is no express authorization by law to support Rule XXVI, subparagraph (b), and its requirements that "further" reports of compliance be filed.

Still further, Section 1008 provides

> "In the exercise of any power or authority—(a) No sanction[43] shall be imposed or substantive rule or order be issued except within jurisdiction delegated to the agency and as authorized by law."

Rule XXVI (b) is therefore *ultra vires* and void under the statutory provisions already cited of the Administrative Procedure Act.

In consequence the Commission had no lawful power to make, or to proceed under, its purported order of September 2, 1947.

Furthermore, unless the Commission had written with reasonable clarity (and had published), a procedural statement, from which it appeared that, in the enforcement of court decrees affirming (or, affirming as modified) its cease and desist orders (made, of course, *only* under the authority of Section 5 of the Federal Trade Com-

[43] By Section 4001(f)—" 'Sanction' includes the whole or part of any agency (1) * * * requirement * * * (3) imposition of any form of penalty or fine; (4) * * * taking * * * of property [*e.g.*, expensive and valuable books] * * * or (7) taking of other compulsory or restrictive action. * * *"

mission Act), the Commission proposed to proceed under the claimed authority of Section 6(b), or, of Section 6(a) and (b), of the Federal Trade Commission Act, such procedure would be invalid and void, quite apart from all other reasons, simply because the Commission had failed so to state in its Rules, its Organization, Procedures, and Functions, or its Statement of Policy, all required to be published pursuant to the Administrative Procedure Act.

But quite to the contrary, Section 10(b) of the published Organization, Procedures and Functions of the Commission indicates an intention to resort only to contempt proceedings and to Section 5(l) proceedings in connection with any attempts to enforce a Court's decree.

D. Subparagraph (b) of Rule XXVI could be lawfully applied to this respondent only if the Court of Appeals' decree of April 20, 1943, were appropriately modified in some new court order.

As will be pointed out below in Point IV, and as has been shown in our analysis of Section 5 of the Act in Point I, the Commission lost all its administrative jurisdiction over this case, known continuously in its records as Docket #4320, at the time when the Court of Appeals for the Seventh Circuit acquired its judicial jurisdiction over the case some six and one-half years ago.

And as we have already pointed out, the judicial review terminated in a "final" decree of that Court which brought this case, as a final decree or judgment brings every case, to a complete and utter end in all respects—except that that Court retained a reserved judicial jurisdiction for the limited and defined purposes mentioned in the final paragraph of its 1943 decree.

As the legal maxim runs, the expression of one is the exclusion of the others (*expressio unius est exclusio*

alterius) so that the expression of the reserved judicial jurisdiction by that Court was also the exclusion of any further administrative jurisdiction in the Commission.

Under such circumstances no statute gave the Commission the administrative jurisdiction which it attempted to arrogate to itself by making its purported order under subdivision (b) of Rule XXVI, and no court order had conferred any such jurisdiction upon the Commission.

If the Commission believed that a "supplemental" report was necessary, it could easily have applied to that Court, on notice to this respondent, and with a proper showing of facts and reasons, after which that Court would duly have heard this respondent. Thereafter that Court would have decided whether or not it had become necessary or apropriate "to enforce compliance in [any] respect with [its] decree and to prevent evasion thereof, and • • • to modify the decree • • •."

If yes, then, under its reserved jurisdiction, and under its general powers of equity, the Court of Appeals could, if it thought fit, have modified its decree by a new order so as to provide for some further kind of a report from this respondent.

The constitutional requirements of due process of law entitled this respondent to no less than the foregoing procedure, which would have granted to this respondent the necessary and constitutional minimum of notice and a hearing, which it has never had before the Commission at any time in this particular proceeding.

Interstate Com. Comm. v. *Louisville & Nashville R. R.*, 227 U. S. 88, 91;

Wichita R. R. v. *Pub. Util. Comm.*, 260 U. S. 48, 59;

U. S. v. *Abilene & So. Ry. Co.*, 265 U. S. 274, 288-289;

Crowell v. *Benson*, 285 U. S. 22, 47-48;

Southern Ruy. Co. v. *Virginia*, 290 U. S. 190.

E. The *ex parte* attempt of the Federal Trade Commission to modify the 1943 decree of the Court of Appeals was unlawful and invalid.

No presumption of law is better established than the presumption of legality.

Thus, every man is presumed innocent until proof beyond a reasonable doubt has established his guilt.

Likewise it is presumed that everyone obeys the law.

It was, therefore, to be presumed by the Federal Trade Commission that this respondent was continuing to obey the law, and that this respondent continued to obey the final decree of the Court of Appeals.

And again we repeat, the Commission has never claimed in the present case that respondent has disobeyed the law or the 1943 final decree. Moreover, the respondent has specifically filed with the Commission its "further report in writing"," in which it has set forth[44] its continued compliance. The Commission has retained, and has not returned, this report of compliance.

Mere suspicion that perhaps this respondent might not be obeying the decree, would, of course, not be sufficient to justify any action by the Commission. Such a suspicion, however, was not in the Commission's mind, we believe.

On the contrary, we think that this is merely the case of an endeavor by the Commission to require respondents

[44] Int. Salt, R. 18; Petitioner's Answer, par. X.
[45] Int. Salt, R. 25-26.

to relieve the Commission of the expense in which the Commission would be involved if it undertook to investigate directly[46] whether or not there was compliance with Courts' orders. (See Appellant's brief below, bottom of p. 28.)

The Commission's new Compliance Division appears to be attempting to establish a new and frugal precedent by which, without a scintilla of proof as to wrongdoing, the expense of compliance investigations can be transferred from the Commission to all respondents, to be borne by them as a kind of unlawful penalty, or novel forfeiture.

To have prepared the detailed report which the Commission called for, together with furnishing the books and papers which the Commission sought to acquire as a gift, would have involved this respondent in substantial expense amounting to hundreds of dollars.

---

[46] As appears from the Commission's Brief (p. 30), what it is really seeking to do in this novel case is "to obtain [the] facts *from the parties*" *only*, and thereby to cast upon the parties all the expense and burden of the Commission's investigatory activities.

But "the customary role of [this] administrative agency" (Petitioner's Brief, p. 21) has heretofore invariably been to conduct its investigations in the field, through inquiries made of third parties. *Nothing contained in the 1943 decree prevents the Commission from making such field investigations.* (Incidentally, this is the only way in which private parties ascertain whether an enjoined defendant is obeying an injunction.)

Therefore the Commission is seeing ghosts, or creating straw men, when it claims (Petitioner's Brief, p. 13) that the decisions below put "a *general* limitation upon [its] powers", and prevent it from gathering facts, and disable it from securing information as to compliance.

Quite to the contrary, the Commission can generally gather facts and secure information from all third parties as fully as it pleases, under the 1943 decree, but at its own expense. But it cannot throw all this expense upon the respondent (the courts below held) without first obtaining a court order made after notice and hearing, as due process of law requires.

We respectfully suggest that the Commission is crying although its powers have not been hurt.

Respondent could not have been fined these sums of money without a lawful trial. Similarly, we urge that such sums of money cannot be taken from this respondent under a different kind of pretext by an *ex parte* order of an administrative body.

Article V of the Amendments of the Constitution of the United States contains the great American and Constitutional shield against the deprivation of life, liberty or property without due process of law.

Nothing is better settled than the rule which holds that notice and a hearing are the minimum requirements of due process of law before an administrative agency.

In the present case, however, the Commission at all times acted *ex parte*, that is, one-sidedly and secretly, just as did the old and discredited Court of the Star Chamber. This respondent had no notice or knowledge that the "additional report" proceeding of 1947 was contemplated; it had no knowledge or notice of what contentions the Commission's official who moved this matter forward before the Commission would make, or did make; and likewise there was no hearing before the Commission at which this respondent was permitted to set forth its own position, to meet such claims as the Commission's officials might have made, and to address to the Commissioners appropriate arguments upon the law and upon the facts for the consideration of the Commissioners and in opposition to the proposed proceeding. Such arguments, we must assume, might well have prevailed, had they been heard and considered by the Commissioners.

Morgan v. *U. S.*, 304 U. S. 1, 15, 18-20.

---

[47] Int. Salt, R. 4.

Likewise all subsequent orders were made by the Commission *ex parte*[48] insofar as this respondent was concerned.

Within the framework of the organization of the Commission itself, we submit that this persistently one-sided and secret procedure was unlawful, irregular and improper.

The Administrative Procedure Act (U. S. Code, Title 5), in Section 1004, and especially therein in subdivision (a) and (b) provides for a proper hearing, and for giving notice to an administrative respondent concerning the matters of fact and law which will be asserted against him before the administrative body. These subsections also require an opportunity to be afforded to such a respondent for the submission to and consideration by the administrative agency of the respondent's facts and arguments.

As we have already pointed out prgviously, under the Administrative Procedure Act the Commission cannot lawfully follow any procedure which it has not published in an explicit form in the Federal Register. We have already mentioned the Commission's August, 1947, statement of "Organization, Procedures and Functions". With especial reference to Section 12(a) thereof—the "Compliance and Enforcement" section—it is not therein claimed that the "supplemental" compliance order mentioned in the second sentence of Section 12(a)—or any of the other orders made herein—may be administratively made *ex parte*, as was done in this case.

We think it true that the Administrative Procedure Act was intended to prevent the Star Chamber action which the Commission took in the present case.

---

[48] Int. Salt, R. 12, 6-7.

And, we repeat, we believe that the Fifth Amendment likewise forbids such arbitrary proceedings *in camera*.

In concluding this topic, we ask the Court to bear in mind that, while our discussion of this point may at times have seemed to assume that the Commission had jurisdiction, yet it is our position that the Commission never had any such jurisdiction, and that such jurisdiction was exclusively and always in the Court of Appeals for the Seventh Circuit, as, we submit, the Courts below correctly held.

III

The Commission's rules, etc., did not purport nor lawfully permit it, in the disguise of requiring a purported report, to confiscate an expensive set of books without paying, or offering to pay, just compensation therefor.

The respondent otherwise essentially complied with the Commission's order.

This point, particularly, the Commission sought to gloss over in its brief below, and quite ignores here.

The Commission's own rules nowhere purport to authorize it to compel the gift of a set of expensive books. This further and tacitly acknowledged obstacle the Commission attempted to gloss over below with the airy claim that it was all just a trifling matter of "form" (Appellant's brief below, p. 56)—the "form of the report".

But if, as a mere matter of "form", the Commission can lawfully require the gift to it of an expensive set of books, why cannot it claim the power, for example, to call upon General Motors Corporation to file a "special" report, and, "*as a part of the reports*" (Emphasis the Com-

mission's brief below, at p. 56), call upon General Motors for the gift of a set of expensive automobiles—say, one of each type and make?

The Commission's Rule XXVI (b), purports to justify it in requiring a respondent to file "further reports", but nothing therein contained purports to justify the Commission's demand that a set of expensive books be given as a gift to the Commission.

Notwithstanding this total lack of authority the Commission's purported order of September 2, 1947, called upon this respondent not only to file a considerable quantity of its papers and documents with the Commission, but also to give to the Commission, as a gift, a valuable and expensive set of books, the rate books, *in addition* to filing an "additional report" in writing.

Clearly this was an excessive and an unlawful demand.

For this reason alone, if there were no other in this case, we respectfully contend that the purported order of the Commission, dated September 2, 1947, was in excess of its lawful powers, and consequently, that it was void, and could form no lawful foundation upon which to predicate this action for the forfeiture of $100 *per diem*.

A. This respondent complied with the purported order of the Commission, so far as validity of the order can be claimed under any theory of the case.

The respondent's further report of compliance[49] states, by reference to the original report, that this respondent has, ever since the time of the original report of compliance, complied with the order of the Court of Appeals for the Seventh Circuit, and that respondent continues

[49] Int. Salt, R. 25-26.

to comply therewith in manner and form, all as set forth at full length in the original report of compliance.

The additional and supplemental report was received and retained by the Commission without objection.[50] We think it clear, therefore, that, in any view which may be taken of this case, this respondent has complied with the valid portion—if any—of the Commission's purported order of September 2, 1947, and that it has never been in default thereof.

In no event, therefore, is this respondent liable for the grievous and harsh forfeiture of $100 *per diem* which the act clearly intends to exact only from those who defiantly challenge the law or deliberately disregard it, and which clearly was not intended to apply to a respondent who respectfully defers to the asserted apparent authority and power of the Commission, and who seeks only to establish, through subsequent due judicial procedure, what is lawful, right and just in the premises.

IV

The power of the Commission to require an *original* certificate of compliance under sub-paragraph (a) of Rule XXVI is *not* now in issue.

Since the *original* compliance report was required by the Court of Appeals' 1943 decree, in the exercise of its equitable powers, the question of the power of the Federal Trade Commission in that respect is nowhere involved in this case. Respondent fully complied with that require-

[50] Int. Salt, R. 18, answer's par. X.

ment of the decree over six and one-half years ago,[51] as the petitioner concedes in its brief.[52]

Moreover, each of the lower Courts was careful to refrain from expressing any opinion on this topic.

We respectfully urge that the Commission, by laying some emphasis upon this topic,[53] is inviting this Court to pronounce a *dictum* upon a matter which is not an issue under the pleadings; which was not decided by either of the lower courts, and which is not a contested issue before this Court.

CONCLUSION

It is respectfully submitted that the opinions and judgments of the Courts below were correct, and that they should be affirmed by this Honorable Court.

Respectfully submitted,

FREDERIC R. SANBORN,
Counsel for Respondent,
International Salt Company.

Dated: December 9, 1949.

---

[51] Int. Salt, R. 32-35.

[52] Petitioner's Brief, p. 4.

[53] E.g.: Questions 1 and 2 on p. 2 of the petitioner's brief are too sweepingly phrased; so is specification of error 5 on p. 9, for, we submit, the Court of Appeals did *not* so hold. Likewise specifications 2, 3, 6 and 7.